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No. 943

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, PETITIONER

v.

ATLANTIC COAST LINE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	6
Reasons for granting the writ	7
Conclusion	8

CITATIONS

Cases:	
Powell v. *United States*, 60 F. Supp. 433, affirmed, 152 F. 2d 228	5
United States v. *Powell and Anderson*, No. 942, this Term	6, 7
United States v. *Powell and Anderson*, 152 F. 2d 228	6
Statutes:	
Lend-Lease Act of 1941, 55 Stat. 31, 22 U. S. C., Supp. IV, 411–419, Section 2	3
Transportation Act of 1940, 54 Stat. 898, 49 U. S. C. 1, *et seq.*	
Section 321 (a)	6, 7
Section 322	3

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above-entitled case on December 13, 1945.

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Virginia, Richmond Division (R. 1–7), is unreported. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 9) is reported in 152 F. 2d 230.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 13, 1945. The jurisdic-

tion of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether phosphate rock moved on government bills of lading and consigned to the British Ministry of War Transport under the Lend-Lease Act, 55 Stat. 31, 22 U. S. C. § 411–419, for use as farm fertilizer in Great Britain, is "military or naval property of the United States moving for military or naval and not for civil use", within the meaning of Section 321 (a) of the Transportation Act of 1940, 54 Stat. 898, 954, 49 U. S. C. § 65 (a), and is, therefore, entitled to move at land-grant rather than commercial freight rates.

STATUTES INVOLVED

The relevant portions of the Transportation Act of 1940, 54 Stat. 898, 49 U. S. C. 1, *et seq.*, and of the Lend-Lease Act, 55 Stat. 31, 22 U. S. C. 411–419, are set forth in the Appendix to the petition for certiorari in *United States* v. *Powell and Anderson*, No. 942, this Term, filed concurrently herewith.

STATEMENT

The basic facts were stipulated by the parties (R. 1–7). In August and September 1941, a number of cars of phosphate rock moved on Government bills of lading over the respondent's railroad from Agricola, Pierce, and Brewster, Florida, to

Tampa, Florida (R. 3), consigned to the British Ministry of War Transport (R. 3), a duly authorized representative in the United States of His Majesty's Government (R. 4). They were shipped under the Lend-Lease Act, for export to Great Britain and for use there as farm fertilizer (R. 5–6). Respondent billed petitioner for and petitioner paid the transportation charges on said shipments at the "commercial rates" (R. 3). Thereafter, the General Accounting Office issued Notices of Exception to these payments, "suspending credit in the accounts of the disbursing officer" in the amount of $4,192.33 (R. 3–4). See Section 322 of the Transportation Act of 1940, 54 Stat. 898, 955, 49 U. S. C. 66. Thereafter, the Comptroller General made appropriate deductions from other bills admittedly due respondent. Respondent instituted this action in the United States District Court for the Eastern Disrict of Virginia to recover the amounts so withheld. Petitioner filed its counterclaim for the same amount.

The parties also stipulated that the shipments involved were of "defense Articles", as defined in Section 2 of the Lend-Lease Act; that when requisition is made by any country, the defense of which the President of the United States deems vital to the defense of the United States, such requisition is considered and scrutinized; that it is accepted, modified, or rejected in accordance with the determination by the President or his repre-

sentative, such as the Lend-Lease Administrator or the Foreign Economic Administration, as to whether or not shipment of the requisitioned materials will promote the defense of the United States in accordance with the provisions of the Lend-Lease Act; that "In 1941 at the times the requisitions for the materials involved in the counterclaim were made, approved, and authorized, and the shipments moved, there was a serious food situation in Great Britain, by virtue of the fact that Great Britain, normally a heavy food importing nation, was cut off from many sources of supply"; that it was necessary for Great Britain to intensify production of food for direct human consumption and for this purpose to use phosphate fertilizers; that "the shipments of phosphate rock and superphosphate comprised a part of that program"; and that "Great Britain instituted controls which resulted in the proper use and distribution of said materials to accomplish this purpose, for which they were requisitioned and authorized under the Lend-Lease Act" (R. 5–6).

The parties further stipulated that the Seaboard Air Line Railway is the only land-grant railroad company in Florida over whose line land-grant rates apply from Agricola, Pierce, and Brewster, Florida, which stations are stations on both the respondent's railroad and the Seaboard Railway; that the Seaboard Railway has filed with the Sec-

retary of the Interior a release of any claims it may have against the United States to lands granted to it; that such release was filed within one year from the date of the enactment of the Transportation Act of 1940 and was approved by the Department of the Interior; and that respondent is not a land-grant railroad but has entered into an "equalization agreement" with petitioner (R. 5).

The district court found (R. 7) that "the facts stipulated are not in any material respect different from the facts in" *Powell* v. *United States*, 60 F. Supp. 433, affirmed, 152 F. 2d 228 (C. C. A. 4), petition for writ of certiorari pending, No. 942, this Term. "Under the stipulated facts and on authority of that case" the district court concluded that the phosphate rock in question

> * * * was not military or naval property of the United States at the time it was being transported and was not then moving for military or naval use but was moving for civil use within the meaning of Section 321 (a) of the Transportation Act of 1940 and that therefore the freight rates applicable to such shipments are the full commercial rates. (R. 7.)

The court accordingly entered judgment for respondent for $4,192.33 and dismissed petitioner's counterclaim (R. 1).

On appeal, the circuit court of appeals held that "the facts in this case and the question arising

on these facts differ in no essential respects from the facts and the question involved in *United States* v. *Powell and Anderson,* Receivers of the Seaboard Air Line Railway Company, 152 F. 2d 228" (C. C. A. 4), petition for a writ of certiorari pending, No. 942, this Term, and affirmed the judgment of the district court "for the reasons set out in our opinion" in that case (R. 9).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fourth Circuit erred:

1. In holding that the United States was not entitled to land-grant rates on the shipment of phosphates under the Lend-Lease Act for use in Great Britain.

2. In holding that such phosphates, belonging to the United States and exported to Great Britain pursuant to the Lend-Lease Act for use as farm fertilizer in Great Britain, were not "military or naval property of the United States," within the meaning of Section 321 (a) of the Transportation Act of 1940.

3. In holding that such phosphates, belonging to the United States and shipped on consignment to the British Ministry of War Transport, pursuant to the Lend-Lease Act, for export to Great Britain for use there as farm fertilizer, were not "moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.

4. In holding that not all "defense articles," within the meaning of the Lend-Lease Act, exported pursuant to the Lend-Lease Act, are "military or naval property of the United States," within the meaning of Section 321 (a) of the Transportation Act of 1940.

5. In holding that not all "defense articles," within the meaning of the Lend-Lease Act, exported under that Act, are "moving for military or naval and not for civil use," within the meaning of Section 321 (a) of the Transportation Act of 1940.

6. In affirming the judgment of the district court which had entered judgment for respondent and dismissed petitioner's counterclaim.

REASONS FOR GRANTING THE WRIT

In this case, as in *United States* v. *Powell and Anderson*, No. 942, this Term, now pending on a petition for a writ of certiorari, we submit that the court below was in error in holding that the Government was obligated to pay the full commercial freight rates rather than the lower land-grant rates on shipments of phosphates consigned to the British Ministry of War Transport for export to Great Britain under the Lend-Lease Act and for use there as farm fertilizer. The reasons for granting the writ in this case are identical with those set forth in the petition for certiorari in the *Powell and Anderson* case.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

MARCH 1946.

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